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EXAMINER

WALDBAUM, SAMUEL A

ART UNIT

PAPER NUMBER

1792

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PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

# Office Action Summary

## Application No.

10/583,697

## Applicant(s)

CURTIUS ET AL.

## Examiner

SAMUEL A. WALDBAUM

## Art Unit

1792

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 20 June 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 11-20 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 11-20 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 20 June 2006 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-8508)  
Paper No(s)/Mail Date 6/20/06
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## DETAILED ACTION

### *Double Patenting*

1. A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states that "whoever invents or discovers any new and useful process ... may obtain a patent therefor ..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in scope. The filing of a terminal disclaimer cannot overcome a double patenting rejection based upon 35 U.S.C. 101.

2. Claims 11 and 12 provisionally rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 11 and 12 of copending Application No. 10583636. This is a provisional double patenting rejection since the conflicting claims have not in fact been patented.

### *Claim Objections*

3. Claim 18 is objected to because of the following informalities: this statement is repeated "a detection in a qualitative manner". Appropriate correction is required.

### *Claim Rejections - 35 USC § 102*

4. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless --

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

*Claims 11-13 rejected under 35 U.S.C. 102(b) as being anticipated by Wennerberg et al (U.S. 3,539,153, hereafter '153).*

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5. Claims 11-13: `153 teaches a dishwasher (col. 1, lines 1-7) with a chamber for the dishes (col. 2, lines 40-75), with capacitance fluid level sensors (col. 2, lines 55-75) where it is inherent how a capacitance level sensor works by changing its capacitance based of the dielectric change based off the level of the water. Claims directed to apparatus must be distinguished from prior art in terms of structure rather than function. *In re Danly*, 263 F.2d 844, 847, 120 USPQ 528, 531 (CCPA). “[A]pparatus claims cover what a devices is not what a device does” *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469, 15 USPQ2d 1525, 1528 (Fed. Cir. 1990).

***Claim Rejections - 35 USC § 103***

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

7. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

***Claims 12-20 rejected under 35 U.S.C. 103(a) as being unpatentable over Wennerberg et al (U.S. 3,539,153) as applied to claim 11 above further in view of Adamski et al (U.S. 4,982,606, hereafter '606).***

`153 teaches all the limitations of claim 11 above.

8. Claims 12-14: `153 teaches the use of a capacitance sensor in a dishwasher (col. 2, lines 40-76). `153 does not detail the specifics about the sensor. `606 is solving the same problem as the applicant of using a capacitance sensor to determine the fluid level in a container. `606 teaches that the sensor reacts to the dielectric constant difference between air and water (col. 4 line 15-col. 5, line 10) where the sensor is composed two active sensor surfaces (parts 50 and 52) where the electromagnetic field is formed and varies based of the dielectric constant of water and air (col. 4, line 15-col. 5, line 10). Claims directed to apparatus must be distinguished from prior art in terms of structure rather than function. *In re Danly*, 263 F.2d 844, 847, 120 USPQ 528, 531 (CCPA). “[A]pparatus claims cover what a device is not what a device does” *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469, 15 USPQ2d 1525, 1528 (Fed. Cir. 1990). All of the claimed elements were known in the prior art and one skilled in the art could have combined the elements as claimed by known methods with no change in their respective functions, and the combination would have yielded predictable results to one of ordinary skill in the art at the time of the invention, meaning that the capacitance level sensor taught by `606 can be the capacitance level sensor of apparatus `153 to yield the predictable result of determining the fluid level inside the wash container.

9. Claim 15: `606 teaches that the sensor is located outside the container (col. 5 line 1-col. 6, line 69), with a sensor surface (parts 50 and 52) isolated from the rinsing fluid by a structure other than the wall of the container, by using a fluoroplastic (col. 5, lines 50-69).

10. Claim 16: `606 teaches that the sensor probes (part 50 and 52) are made of steel plates (col. 4, lines 30-69, which is electrically conducting), where an electromagnetic field is created

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that varies with the height of the water (col. 4 line 30-col. 6, line 69). Claims directed to apparatus must be distinguished from prior art in terms of structure rather than function. *In re Danly*, 263 F.2d 844, 847, 120 USPQ 528, 531 (CCPA). “[A]pparatus claims cover what a device is not what a device does” *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469, 15 USPQ2d 1525, 1528 (Fed. Cir. 1990).

11. Claim 17: See claim 15 above.

12. Claim 18: ‘606 teaches using electrical means to detect the different capacitance in a qualitative manner to determine the height of the fluid (col. 5 line 25-col. 7, line 65). Claims directed to apparatus must be distinguished from prior art in terms of structure rather than function. *In re Danly*, 263 F.2d 844, 847, 120 USPQ 528, 531 (CCPA). “[A]pparatus claims cover what a device is not what a device does” *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469, 15 USPQ2d 1525, 1528 (Fed. Cir. 1990).

13. Claim 19: ‘606 teaches that a preset value is stored and compared to the level sensor to see if a height is reached (col. 7, lines 35-60). Claims directed to apparatus must be distinguished from prior art in terms of structure rather than function. *In re Danly*, 263 F.2d 844, 847, 120 USPQ 528, 531 (CCPA). “[A]pparatus claims cover what a device is not what a device does” *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469, 15 USPQ2d 1525, 1528 (Fed. Cir. 1990).

14. Claim 20: ‘153 teaches using multiple sensors to determine a low, medium and high height (col. 2, lines 60-70). ‘606 teaches that the height is constantly monitored to determine the height of the fluid (col. 7 lines 35-65). It would have been obvious to one of ordinary skill in the art at the time the invention was made to have used low, medium and high level of the fluid in

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apparatus '153 in view of '606 to classify the level of the fluid in specific height ranges. Claims directed to apparatus must be distinguished from prior art in terms of structure rather than function. *In re Danly*, 263 F.2d 844, 847, 120 USPQ 528, 531 (CCPA). “[A]pparatus claims cover what a device is not what a device does” *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469, 15 USPQ2d 1525, 1528 (Fed. Cir. 1990).

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to SAMUEL A. WALDBAUM whose telephone number is (571)270-1860. The examiner can normally be reached on M-TR 6:20-3:50, F 6:30-10:30 est.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Cleveland can be reached on 571-272-1418. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/S. A. W./  
Examiner, Art Unit 1792

/FRANKIE L. STINSON/  
Primary Examiner, Art Unit 1792